EXHIBIT 18

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: TRIAL TERM PART 60

- X

UBS SECURITIES LLC and
UBS AG, LONDON BRANCH,

Plaintiffs,

- against -

INDEX NO.
650097/09

HIGHLAND CAPITAL MANAGEMENT, L.P.,
HIGHLAND CDO OPPORTUNITY MASTER
FUND, L.P., HIGHLAND SPECIAL
OPPORTUNITIES HOLDING COMPANY,
HIGHLAND FINANCIAL PARTNERS, L.P.,
HIGHLAND CREDIT STRATEGIES MASTER
FUND, L.P., HIGHLAND CRUSADER OFFSHORE
PARTNERS, L.P., HIGHLAND CREDIT
OPPORTUNITIES CDO, L.P., and
STRAND ADVISORS, INC.,

Defendants.

- X

60 Centre Street
New York, New York
May 1, 2018

TELEPHONE CONFERENCE

BEFORE:

HONORABLE MARCY S. FRIEDMAN,
Justice

APPEARANCES: (Via Telephone)

*** CONTINUED ON NEXT PAGE ***

Appearances

LATHAM & WATKINS LLP
Attorneys for the Plaintiffs
11th St. NW, Suite 1000
Washington DC 20004
BY: ANDREW CLUBOK, ESQ.
ELIZABETH DEELEY, ESQ.
SUSAN ENGEL, ESQ.
KUAN HUANG, ESQ.
ALYSHA NAIK, ESQ.

McKOOL SMITH
Attorneys for the Defendants
One Bryant Park, 47th Floor
New York, New York 10036
BY: GAYLE KLEIN, ESQ.
GARY CRUCIANI, ESQ.
MICHAEL FRITZ, ESQ.

Bonnie Piccirillo
Official Court Reporter

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THE COURT: On the record.

Good afternoon, counsel. This is Judge Friedmann. May I have the appearances of every counsel who is on the line, please.

MR. CLUBOK: Good afternoon, Justice Friedman. This is Andrew Clubok for plaintiffs, and I'm on the line with Elizabeth Deeley, Susan Engel, Kuan Huang and Alysha Naik.

MS. KLEIN: Good afternoon, your Honor, this is Gayle Klein from McKool Smith for the defendants, and also joining me this afternoon is Gary Cruciani, C-R-U-C-I-A-N-I, and Michael Fritz, F-R-I-T-Z.

THE COURT: Thank you.

Will Mr. Clubok and Ms. Klein be the only two attorneys who will be speaking?

MR. CLUBOK: I think so for us, your Honor.

MS. KLEIN: I believe so, your Honor, unless you start talking about scheduling in which case we might need Mr. Cruciani to speak, as well.

THE COURT: That's fine. If anyone other than the two of you speaks, that person should say their name before they start speaking.

We have reviewed the parties' submissions on the bifurcation issue. I have quite a few questions.

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The first question is what are the parties' positions on whether the damages for breach of contract would be decided by the Court at the bench trial if we were to bifurcate as between a bench trial and a jury trial?

Let's start with UBS, please.

MR. CLUBOK: The Court would decide the damages for breach of contract.

THE COURT: Ms. Klein, do you disagree?

MS. KLEIN: We do not disagree with that, your Honor.

THE COURT: The next question is as follows:

Is it correct that it is plaintiffs' position that the implied covenant claim would be for the Court, but would be tried in the jury trial phase?

(Interrupted by a voicemail recording)

MR. CLUBOK: Your Honor, we had previously -- this is your voicemail, your Honor. Somehow there's a way to delete this message, if you'd just give me a second.

(Interrupted by a voicemail recording)

Originally, we called in and they put us into the Court's voicemail. So if there's a message, should be from us, but I think I deleted it. I'm not sure.

THE COURT: If there is a message from you in this -- we weren't able to transcribe it right now.

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So, all right --

MR. CLUBOK: You can just delete it. It was just trying to reach you a few minutes ago when they originally put us through to your voicemail. You can just delete it.

THE COURT: Ms. Klein, do you agree with that?

MS. KLEIN: Yes, your Honor.

THE COURT: So is it correct that it is plaintiffs' position that the implied covenant claim would be for the Court, but would be tried in the jury trial phase?

MR. CLUBOK: Yes, your Honor.

THE COURT: And is it also the plaintiffs' position that the implied covenant claim relates to the fraudulent conveyance claim and not to the fraudulent inducement?

MR. CLUBOK: Absolutely, yes.

THE COURT: Is it the defendants' position that the implied covenant claim implicates events leading up to the transaction and, therefore, relates to the fraudulent inducement claim?

I am referring to a statement that I read on page 2 of the defendants' brief, which seemed to indicate that that was the defendants' position.

MS. KLEIN: That is the defendants' position, your

Honor.

THE COURT: Would you explain in detail the basis for claiming that the implied covenant claim relates to the fraudulent inducement claim? And then I will hear a response. I'd like you to address the evidence that would be heard on both the implied covenant and the fraudulent inducement claim.

That said, I don't expect you to address the evidence exhaustively, but I do expect you to give me some specific examples, and you will not be waiving any arguments that might be raised in the future by only highlighting certain evidence on this conference call. Have I allayed any anxiety?

MS. KLEIN: You have not, your Honor. Thank you for that.

In the implied covenant of good-faith and fair-dealing claim relates to a claim that the defendants somehow had promised with respect to the negotiation of the Agreements that they would, in fact -- some of the defendants would make sure that the Fund Counterparties were sufficiently flourished with assets such that they would pay for breach of contract damages, and that they would undertake no action that would render them unable to pay. And, that there is sufficient or substantial evidence relating to the due-diligence process in which UBS

undertook a review of the Fund Counterparties' ability to pay and found it lacking.

Specifically, they found that the Fund Counterparties had no ability to pay and, therefore, they aired into the transaction fully aware that if there were a breach of contract, they would not be made whole -- "they" being UBS.

And, therefore, any suggestion under an implied covenant of good faith and fair dealing that the defendants somehow promised that the Fund Counterparties would have sufficient assets to pay a breach of contract claim is false, and that is the type of evidence that we would elicit in defense to the implied covenant claim, also in defense of the fraudulent inducement claim.

THE COURT: Ms. Klein, isn't the implied covenant claim as pleaded based solely on post entry into transaction alleged wrongful or fraudulent conveyances?

MS. KLEIN: The inability to pay for the breach of contract certainly is, in part, related to the fraudulent conveyance; but the promise or the alleged promise to make sure that there would be assets to pay and that there would not be actions undertaken that would diminish that comes from the contract negotiation and the understanding of the defendants at the time the contract was negotiated, as well as it implicates the assets that

were offered in the margin calls during the contract performance, which the defendants were offered as security and which they refused.

THE COURT: Mr. Clubok, will you respond.

MR. CLUBOK: I will try, your Honor. I'm having a little hard time tracking this, just to be honest.

But, so I think what I'm hearing -- and I have not heard this or had this until we read their briefs and now I'm hearing this explanation like you are.

Our claim is that there's a contract and there is pretty unambiguous requirements that two parties make payments. There's disputes over how much they have to pay, and what the total amounts are going to be, and whether we count this transaction or not; and you're going have to decide those details, but there's a contract for at least some activity, two of the defendants --

THE COURT: Just one moment, please. The court reporter needs those names.

MR. CLUBOK: I'm sorry. There's two defendants, CDO Fund and SOHC, the so-called Fund Counterparties who are obligated and under a contract to make certain payments. There's disputes over how much they have to pay and what's the trigger for those payments, all of those things are part of the breach of contract back and forth.

But, if we win, if we prove our case against those

two, they will have had to pay us money. And there's a third party, HCM, that also signed on to those contracts, but didn't have a direct obligation to pay; yet nevertheless, we say they had an implied covenant of good faith and fair dealing not to, for example, commit fraudulent conveyances that, that made it possible for the two parties who had owed us the money to pay.

First of all, there's no defense against that because before we signed the contract, internally our folks wondered whether, ultimately, the two parties were good credit risks. You wouldn't be able to defend against a breach of contract claim under these circumstances with that theory. So it is kind of manufactured anyway.

THE COURT: Can you slow down a little bit, please, so we can get a record. Thank you.

MR. CLUBOK: Sure, your Honor.

We're talking about the possibility of some parol evidence prior to contract formation about whether or not -- notwithstanding if your Honor finds there were payment terms and monies owed -- that somehow parol evidence from before the contract vitiate the actual obligation to pay because my client was worried that the two parties who promised to pay wouldn't be able to pay. I have a hard time believing your Honor is going to accept that kind of parol evidence if there's no basis for it.

Until this bifurcation breach, I don't think we had ever in the nine years I've litigated the case ever heard that theory. I don't think it is legally valid. It is just kind of thrown out there.

But, even if there was such a legally valid theory and let's pretend for purposes of this argument that it's true, that my clients thought, Gee, if things go south, these two Fund Counterparties that have promised to pay will not be able to in fact pay the total amount, the total $500 million of damages; does that mean then that they expected there to be fraudulent conveyances which is -- is basically, you know, the implied covenant of good-faith and fair-dealing claim that we now have is that they shouldn't have committed fraudulent conveyances to make it certain that these two parties couldn't have paid.

I mean, the defendants are just trying to interject a really far-afield defense that I doubt your Honor is going to even entertain and then expand it to a point that it just sort of is something I've never heard of in a contract dispute and, certainly, we never heard of in this case until two weeks ago when we saw this brief and now as I've heard it explained.

So that's -- to make that the bootstrap for now there's such substantial overlap that we have to bifurcate the trial, with all due respect the defendants, I think is

a stretch.

The other thing I would say is even if you credit this, all I've heard is that there's overlap between fraudulent inducement and implied covenant of good faith and fair dealing, all of which we are proposing to put into the next phase. So even if your Honor is going to do that stuff, it is going to be in the next phase.

But I just think that this is not an argument that can be seriously used -- you know, we can have a motion practice on whether you're going to ever entertain that kind of parol evidence, or we could stipulate for the sake of argument that let's say were even true, that our clients -- the credit risk people that my clients worried that the two Fund Counterparties wouldn't be able to pay or assumed they wouldn't be able to pay and said, Gee, this is a risky contract that these two won't be able to pay, that doesn't -- because people internally are worrying about that, that doesn't strip the obligation to actually pay and it certainly doesn't give license to a signatory to the contract, Highland, to violate either express obligations or to implied duty of good faith and fair dealing by insuring that the two parties can't pay.

THE COURT: Mr. Clubok, when you refer to the possibility of parol evidence, you are talking about parol evidence that the defendants would possibly introduce

regarding the lack of assets of the Fund Counterparties or regarding UBS's due diligence unit's knowledge of the lack of assets of the Fund Counterparties; is that correct?

MR. CLUBOK: Correct. On this particular species of parol evidence, it's something that plaintiffs would never put into the case. We don't think it is legally relevant. It's not something that the parties have ever talked about in this context as ever being potentially relevant to the breach and implied covenant good-faith and fair-dealing claim, and I just think it is just -- yes, in short, it is a theory that defendants say they're going to try to interject as a supposed defense to our implied covenant of good-faith and fair-dealing claim, which is really about how Highland Capital dealt with the aftermath of the breach of contract and whether they fraudulently transferred assets.

THE COURT: All right, but you are not intending on your implied covenant claim, am I correct, to put in any evidence that relates to the fraudulent inducement claim; is that right?

MR. CLUBOK: Absolutely not; you are correct.

THE COURT: Okay.

All right, now, let's --

MS. KLEIN: May I interject one --

THE COURT: Yes, of course. Go ahead.

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MS. KLEIN: First of all, we don't agree, obviously, that there is a fraudulent conveyance or any fraudulent inducement. But, more importantly, in order to survive an implied covenant claim, the plaintiffs are going to have to prove what the implied covenant is and that in fact exists, and the evidence that they're calling parol, which we don't think is parol, goes to vitiate the --

THE COURT: Just a moment. Just a moment. I know there's a lag. The reporter didn't get it. She lost you at "vitiate," so can you repeat your last sentence, please, and the reporter is asking that it be a little slower.

MS. KLEIN: The evidence that we intend to introduce vitiates the fact of any implied covenant of good faith and fair dealing because the plaintiffs new and understood that the Fund Counterparties did not have the ability to pay and that the Highland Capital Management also disputed that in the event the Fund Counterparties could not pay, it was in any way liable.

THE COURT: I don't think I'm going to hear anything more on that at this time.

Now, let me go to my next question.

How can -- withdrawn.

Mr. Clubok, is it your position that it is for the Court to decide the implied covenant claim?

MR. CLUBOK: Yes. Yes, your Honor.

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THE COURT: Yes, just give me a minute, please.

Is that not an equitable claim? And if not, what happens if the Court and the jury reach different conclusions on whether action was taken to transfer assets that would have been used to satisfy a judgment, assuming for purposes of argument only that the Court would have previously concluded that there was to be a judgment?

MR. CLUBOK: Well, there's two different legal standards. So, the facts that relate to this are the same, the same body of facts. Mostly overlapping, I would say.

There are slightly different legal tests. One being for implied covenant of good faith and fair dealing is a legal standard that your Honor would have to apply to those facts; and there's a different standard, I think generally a higher standard -- you could argue is different standard. Let's just say different standard on fraudulent conveyance that largely you take the same set of facts and the jury apply the different, you know, jury instruction to the standard for them to decide whether it constitutes a fraudulent conveyance, then the court and the jury could decide they are both breach of implied covenant good faith and fair dealing and fraudulent conveyances; or, your Honor could decide it is breach of implied duty of good faith and fair dealing, but it doesn't rise to the level of fraudulent conveyance or vice versa.

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They're just two different legal tests, but substantially overlapping facts.

That's why we would propose moving that one -- now that the fraudulent conveyance is back in the case, that's why we would say that the trial that was currently set for June where we were going to have -- where we all agreed that agree your Honor would do the implied covenant good faith and fair dealing along with the breach of contract; we're now saying, Okay, that substantially overlaps. It is a very discrete set of facts so put that for the second phase of the case.

THE COURT: Ms. Klein.

MS. KLEIN: Your Honor, we agree that there are two different legal standards and, of course, the two different triers of fact can decide it differently. We do disagree that the parties emphatically agree that the case could be bifurcated if the fraudulent conveyance claim came back into the case; and, in fact, it was Mr. Clubok who represented to Ms. Barnett that if the 1st Department reversed course and added the claims back in and that the parties wanted to reconsider whether or not a bifurcation was appropriate, which is what has lead to this exercise.

MR. CLUBOK: If I may, just to be clear, I wasn't suggesting otherwise. What the parties agreed to on March 9th during the conference with the Court was that

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we were going to -- at that time fraudulent conveyance was out of the case because of the 1st Department's original decision; and the parties had agreed we would do the breach of contract and the breach of implied covenant of good faith and fair dealing; but we would bifurcate out the fraudulent inducement to a later time and alter ego to a later time. That's the status quo.

And then we did say, Gee, if the Court puts back in the fraudulent conveyance, we'll have to reassess and so now that the fraudulent conveyance is back in, we have a couple of options. One is to do everything all together, but for a number of reasons that makes less sense than just saying, Okay, fraudulent conveyance, it substantially overlaps and I didn't hear Ms. Klein disagree with that. It overlaps with the breach of implied covenant of good faith and fair dealing.

So the smart thing to do is to put that one to the later part of the case. No one had agreed to it before. We said we would reassess, and that's what we're doing and our proposal is we'll make this trial even easier and now we put off one issue that we thought we were going to be trying in June, but now we don't have to try in June because it substantially overlaps with this fraudulent conveyance and we will try the second phase under plaintiffs' proposal.

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THE COURT: Mr. Clubok, I really must ask you again to speak more slowly because this is proving very difficult for the reporter.

I think we got everything down there, but it's difficult to do it repeatedly at that rate.

Ms. Klein, do you have anything that you want to add in response to the last statement of Mr. Clubok?

MS. KLEIN: Yes, your Honor. Just briefly, and that is that as our submission demonstrates upon evaluation after the 1st Department's decision, we think there's substantial overlap not only of the evidence, but also of the witnesses that we would bring; and, therefore, we think that fairness dictates that this all be done at the same time.

THE COURT: All right, I was actually going to ask you to elaborate on that, on the overlap of witnesses.

The briefing on this, it is not expansive, shall we say. So can you elaborate on which witnesses would overlap and with respect to what issues?

MS. KLEIN: Certainly, your Honor.

There are several witnesses on both sides who had involvement in the deal and throughout the process.

On the defense side for the Highland Capital Management parties is Philip Braner and on the plaintiffs' side is Mr. LeRoux, L-E-R-O-U-X, and Mr. Grimaldi,

G-R-I-M-A-L-D-I and Mr. Bawden, B-A-W-D-E-N.

Those three gentlemen participated in the negotiation and the meaning of the Agreements. They participated throughout the performance of the Agreements and some were also involved in the -- what we'll call post termination conduct.

So we anticipate that those three gentlemen have ultimately evidence relevant to all of the claims.

The complicating factor, of course, is that Mr. Braner is no longer an employee of a Highland entity. He is now working for a wholly separate company in Dallas; and Mr. LeRoux is no longer working for UBS and he's working for a wholly separate company in North Carolina. And, therefore, if we are not to do this all at the same time, even if Mr. Braner and Mr. LeRoux come to a first trial, it is unknown whether or not that they would participate in a second trial.

Therefore, given that they have knowledge of anything that happened before, during and after the performance of this Agreement, we think that there's substantial overlap.

The damages experts also have substantial overlap. On our side, it is a gentleman named Mr. Warren, and on the other side it is a gentleman named Mr. Dudney. So both of those experts would be called to testify in both phases of

a trial.

And then, also, the Highland defendants allege that there's something called hedging. That is an offset to damages regardless whether it is breach of contract or fraudulent conveyance or otherwise. He testifies about hedging and about the risks and the process related thereto.

UBS claims that Mr. Mammola's testimony is not relevant to a breach-of-contract claim because the hedging occurred at the outset of the contract; not at the outset of the alleged breach.

But, the hedging did occur at the outset of the alleged fraudulent inducement; and, therefore, Mr. Mammola's testimony would be relevant to all of the claims or at least to a discussion in his testimony about whether or not he should be permitted to testify at trial on breach of contract, as the plaintiffs have alleged that he is not.

Mr. Mammola lives in London and, therefore, it is quite costly to bring him to testify to trial. So that is another witness who is overlapping on a different claim.

THE COURT: Is there a reason why I couldn't hear the hedging offset issue insofar as it bears on the contract claim at the time we had the jury trial?

MS. KLEIN: Well, we believe that the hedging

offset, obviously, completely offsets any damages; and, therefore, if your Honor were to do that, that at the outset of the first stage of any trial, you would only decide whether or not there's liability and you would move all damages into a second phase of a trial.

THE COURT: Can you give me a bit more detail on what this overlap is in the testimony that the three UBS witnesses and the one Highland witness would be giving?

MS. KLEIN: Certainly. Mr. Braner, who is the Highland former employee, negotiated and restructured the transaction; and he has knowledge regarding the signed Counterparties' performance including, without limitation, the offering of certain assets for the margin calls, as well as the participation of the defendants in the Highland Financial Partnerships or HFP.

In those margin calls and the unwinding of a note transaction, which the defendants claim is the basis for their fraudulent conveyance claim. So Mr. Braner has knowledge and testimony that relates to all aspect of the claim.

Mr. LeRoux and Mr. Grimaldi also negotiated the restructured transaction and have knowledge of the emphasis, which Mr. Grimaldi and Mr. Bawden have knowledge of assessment of the risk and whether or not the parties would have the ability to pay. And Mr. LeRoux and Mr.

Grimaldi also determined when to issue margin calls, and Mr. Grimaldi was involved in the decision to refuse certain assets that were offered by the margin call that relate to the note unwind that is alleged to be the basis for the fraudulent conveyance.

THE COURT: Is there any reason to believe that Mr. Braner will not appear at two phases of a bifurcated trial?

MS. KLEIN: Currently, your Honor, no. He has told us that he will participate; but, of course, he is actively involved with another job and his time is limited, and he is beyond the subpoena power of the Court. And the situation that we seriously want to guard against is Mr. Braner's participation in the first phase; but his refusal in the second phase because he doesn't have time or he's already been generous with his time or because his employer suggests that he should not be able to participate because he's not properly devoting his duties to his new employer, in that instance we would be dealing with a witness who doesn't want to be there and, of course, that is -- if we were to try to force him to come, that would substantially prejudice the defendants because we would have a witness who is uncooperative presenting our main case in front of a jury.

THE COURT: And where is Mr. Braner located?

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MS. KLEIN: He is located in Dallas, Texas.

THE COURT: All right, let's hear from Mr. Clubok on these overlap issues, please.

MR. CLUBOK: Sure. Mr. Braner was going to have this same issue when we agreed to bifurcate the first time.

Mr. Braner is involved in pretty much all aspects of the case from Highland. So when we agreed to bifurcate for the first time, Highland signed up for the fact that Mr. Braner would have to come twice.

Now, the hassle of the flying twice from Dallas, Texas to New York -- I've done it many times and I think Gayle probably has, too -- it is not the worst trip in the world. It's pretty minimal compared to what will happen now and there will be a certain, much easier to identify exactly when Mr. Braner will have to testify in the first phase and in a narrower band of when he testifies in the second.

Also, if our whole bifurcation plan is upset now because Mr. Braner no longer -- well, I just heard that he's willing to come for both so it is like he was willing to do it before. We still think he's willing, but, theoretically, possibly, Mr. Braner might change his mind later and that's why we shouldn't bifurcate now. That's, basically, the thrust of the defendants' argument and we disagree with that as being much of a fact for the Court

should consider.

Having said that, worst case scenario and notwithstanding what Mr. Braner committed to before when we all told the Court we would bifurcate; but notwithstanding what Mr. Braner has recently reconfirmed what he's willing to do and notwithstanding the fact that we have video deposition testimony from him, so we're just happy to designate that testimony. It's easier not to come.

Another way to go about this is if he all of a sudden changes his mind or his employer won't let him make that trip from Dallas to New York for any day for the second phase of the trial, we could just do a trial deposition of him. If we really have to accommodate Mr. Braner and he's got to do it live from Dallas, we can make that work.

That would not be a reason to un-bifurcate or to un-bifurcate the whole trial. It is true that Mr. Braner overlaps. That's the one witness on their side of the fact witness that overlaps, but the evidence that has to come into play for the fraudulent conveyance and the alter ego and fraudulent inducement in the second trial is so -- most of it is totally different and separate and has nothing to do with the straight breach of contract.

There is a four-factor test for fraudulent conveyance. There is a nine-factor test for actual fraud.

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There is a seven-factor test for whether or not the transaction issue was actually an equity infusion, which undercuts their defense was a secured loan and there is a nine-factor test for alter ego. I just did quick math, and that is twenty-nine factors.

All those factors are factual issues with lots and lots of facts. If you recall the summary judgment, much of that PowerPoint that I think I was able to use covered facts because those twenty-nine factors that have nothing to do with the breach of contract that have lots of witnesses and lots of internal documents and lots of stuff of which Mr. Braner is a very small part of.

So all of that stuff should be in the second phase of the trial and just because Mr. Brian might, theoretically, change his mind is not a reason to not bifurcate.

With respect to everything else, you know, there are three UBS witnesses. Okay, that's on us. If our witnesses want to make two trips down to the courthouse, that we appreciate defendants' concern for those witnesses, but that's not a concern they need to worry themselves with.

THE COURT: Excuse me, I thought maybe -- let me clarify this.

Ms. Klein, were you saying that you are going to

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want to call any of those three UBS witnesses?

MS. KLEIN: Yes, your Honor.

THE COURT: All of them?

MS. KLEIN: We have not yet decided all of them. Obviously, our presentation of evidence as defendants depends upon what the plaintiffs present in their case in chief; but, certainly, the current intent is to call all of them and that is what we would like to do.

If I may, just one point, and that is UBS is seeking hundreds of millions of dollars in recovery from my client. It is a jury trial, and we will be substantially and unfairly prejudiced if we cannot call our witnesses live in a jury phase of a trial. We all know that juries respond much better to live witnesses, and we would be at substantial and unfair disadvantage if we were to try to call any witnesses by deposition or by remote feed.

And, the difference here with respect to Mr. Braner is he has testimony that relates to the note unwind that is alleged to be part of the fraudulent conveyance claim, which wasn't in the bifurcated proposed trial previously and it is now in; and, therefore, Mr. Braner has essential testimony and it is essential to my client's ability to be able to defend themselves against these claims to have him appear live, and any chance that he will not do that that's caused by bifurcation is

substantial and unfair harm to my clients.

MR. CLUBOK: Well, I have a solution --

THE COURT: Just a moment, please. Mr. Clubok, can you represent that you have the control to insure that not only Mr. Grimaldi and Mr. Bawden appear in both phases, but also that Mr. LeRoux appears in both phases if Highland wants to call them and you don't in the second phase?

MR. CLUBOK: When Grimaldi and Bawden, they live in New York, I can represent to you and they work for UBS, as long as they do which -- the defendants want this trial to be in October. There is some risk I suppose they could quit their jobs and move out of town before October, but that doesn't get solved by not bifurcating.

So in as much as good faith I can represent that things don't change between now and October, yes, they will show up for the October trial. But Mr. LeRoux, I can't guarantee that anymore that he'd show up in October or not.

I can tell you we are not going to call him even in the first phase. So whether he comes in October and he's currently had indicated that he will cooperate and try to make himself available, but that I can't guarantee outside of subpoena power.

He was deposed by defendants. They do have his video deposition testimony just like any witness who is

unavailable. So whether we bifurcate or not doesn't increase my chances of getting Mr. LeRoux to show up in October. Either he will or he won't. And as defendants put in their papers, we had represented to them that our -- the indication to us in good faith just like their representation about Mr. Braner which we accept, are that he is willing to try to cooperate. So that's about the best I can say about Mr. LeRoux; but bifurcating or not doesn't affect that and I'm not planning to call him in our case in the first phase which, by the way, same thing with Mr. Braner. We're not asking to call Mr. Braner.

If Mr. Braner -- what defense are, basically, saying is, Oh, we can't guarantee that Braner will show up. We want to try this case in October when I guess we can guarantee he'll show up somehow, even though I just heard all the stuff about his employer maybe will change their mind. But, okay, they want to show up for the jury trial, make that the time they show up.

If he also doesn't want to come to New York in front of your Honor, I'm sure your Honor will not take offense if he does a videotaped trial deposition if he needs to do more testimony and he doesn't want to make the trip the New York. Your Honor will be able to distinguish that and will not hold it against him.

So, the fact that Mr. Braner may not want to make

a second trip to New York is not a reason to upset, to totally change this case.

Furthermore, if I could just continue with the other argument that defendants had made. On this hedging issue, they say that their expert doesn't want to come here twice to talk about hedging, which he might theoretically have to do. Your Honor proposed a solution for that, which I think is perfectly fine. But, look, if we have a jury trial, he's going to have to come here twice. This was one of the points we made in our brief.

If we just have a jury trial in the fall, we are going to use a Frye motion because the hedging issue, that threshold question is a legal one, does its hedging even a possible offset for these damages or not? And does Mammola meet the standards articulated in Frye for providing expert testimony on this subject?

We say no. There will be a Frye hearing or presumably he will testify, so he still would have to testify twice. It is just now instead of having to do a Frye hearing -- by the way, all these people, a lot of these experts and your Honor will have to have a Frye hearing and a motion-in-limine hearing which we will avoid to a large extent if we just do those things in what is, essentially, the first phase of the case.

By the way, I heard vigorously, vigorously,

vigorously the defendants say that they believe they will win the breach-of-contract claim; or because of the hedging arguments or the other offsets, they will prove there are no damages.

If that's the case, we'll never have a second phase. If there are no breach-of-contract damages, we will agree to take an appeal if necessary. If we believe there's no legal error, we'll just drop the case. We'll settle it.

We will not insist on a trial on fraudulent inducement if we lose all the breach-of-contract claim; and so if the defendants are right, then hedging can prove the offset, we'll just have this one-week long proceeding in June and the case will be over or it will be potentially subject to appeal if we have any appellate grounds on that score.

THE COURT: Let me stop you, please.

Ms. Klein, would you like to reply to any of that and, also, I would offer you a further and final opportunity to say anything you think is important to say in support of your claim that we should not bifurcate.

MS. KLEIN: Certainly, your Honor.

First of all, I just want to make sure that the record is clear we did not say that Mr. Mammola is not willing to come twice. I just mentioned that he lives in

London and having have him come to New York twice potentially increases the cost and burden to the defendants in defending against these claims.

Same thing with having a bifurcated trial. We believe that given the overlap of evidence and witnesses, it substantially increases the amount of money my clients have to spend to defend against these claims, which we think are wholly defensible.

I also heard Mr. Clubok say that if the defense wins on breach of contract, we may not have a second phase; and he mentions specifically dropping the fraudulent inducement claim. He didn't talk about the fraudulent conveyance claim, the alter ego, the general partner liability claims.

We have a great concern that the case will not stop even if the defense does prove that there is no breach of contract or no damages.

THE COURT: I can't understand that position. What would there be to try if there was no breach in terms of alter ego or any damages issue?

MS. KLEIN: Well, I guess with respect to the fraudulent inducement claim, they could come back and say that they were fraudulently induced, and that --

THE COURT: But that's not what I just heard you say; and Mr. Clubok just represented that if there is a

finding of no breach of contract, they will not proceed with the fraudulent inducement claim.

MS. KLEIN: And so I guess the concern then is, your Honor, what does defense victory mean? What is going up on appeal? What is -- what does it mean that there is no damages? What if the Court finds that there was, for example, $44 million in damages? I was just pulling a number out of the air. Does that then mean that we have to move forward with the second phrase of trial?

It's just uncertain to us what he means by "if we win." If the win is no liability or zero damages, that doesn't vitiate the fact that there's a possibility that there would be a trial or a second phase if in fact it is not a -- it's a zero dollar verdict.

THE COURT: Yes, I understand and that is absolutely correct. That would not vitiate a second phase.

I don't mean to cut you off. Is there anything else that you want to bring to my attention?

MS. KLEIN: The only other thing that I bring to your attention, your Honor, is that if you do, in fact, determine that you would like to bifurcate the trial, we think that the trial should proceed in the fall instead of on June 4th for the reasons that were set forth in our submission.

THE COURT: Mr. Clubok, also, a final opportunity

to you to bring to my attention anything you think important to bring to my attention. I'd ask you to please be brief.

MR. CLUBOK: I'll be very clear and I'll try to speak very slowly.

If there is no liability or if there are zero damages, we will not proceed to a second phase of trial on any of our claims, including fraudulent inducement, fraudulent conveyance or alter ego. We will preserve our right to take an appeal if we think it is appropriate.

If there is something like $44 million in damages, I think there's a pretty good chance the parties can -- there's a pretty good chance the parties will resolve the case, knowing what I know about these parties and about just trials in general. So, anyway so that's the first thing I would say.

The second thing I would just say is that, again, I'd just like to end on the simple fact that the parties have agreed months ago -- when new counsel came along, we were wary that this would be used for a massive delay. I was assured by defense counsel that it was not their intention to do that; and I for my part said, you know what, we will be reasonable. We understand, you guys already have vacations, this trial coming up or that trial coming up.

Let's find a reasonable time. My client would have liked to go to trial in March. We, ultimately, agreed to go forward in June on breach of contract and breach of implied covenant of good faith and fair dealing.

Now, we are saying let's go forward surely on breach of contract. It means no Frye hearing. It means no motions in limine. It means we don't have to have the initial proceeding the Court hd once talked about where we talk about the contract or we talk about hedging in advance of a real trial.

It is a trial that we have been super specific about, exactly who we would call. We have exactly two witnesses in our case in chief: One company witness and one expert and then some deposition testimony we want to designate.

It's a case that we think could be tried in a week or less; and because it's easier than what had previously been agreed to which we agreed to in good faith to wait till June, we do not think it is appropriate now when the case is even simpler than we had agreed to to move everything to October. We think the case should go forward as scheduled. It will either end the case or it will frame the next phase of the case and, perhaps, it will lead to a resolution either way.

MR. CLUBOK: Thank you.

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THE COURT: Ms. Klein, was there anything new there that you feel a need to respond to?

MS. KLEIN: Yes, your Honor. Just very, very, briefly, which is we did come in as new counsel in February. This case has been going on for nine years. I've been practicing law for well over twenty, and it is literally the most complicated case I have ever been involved in.

For the last several weeks we have been involved in reviewing evidence and putting forth the submission to your Honor about why or why the case should be bifurcated or not and what the overlapping evidence is. And the 1st Department further on March 9th threw a monkey wrench into the whole case when it added back in the fraudulent conveyance claim.

Therefore, we're not seeking to move the trial to the fall for purposes of delay, but so that we be given an adequate opportunity to prepare for a designed scope of trial and put together our defense.

We have been focused on the briefing as of May 1st. We don't have clarity regarding the scope of the trial, and we are in fact seeking leave to appeal the 1st Department's recent reversal of the prior opinion and we put those papers in last Friday on the -- I'm sorry on the 20th.

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Therefore, we are moving forward as quickly and expeditiously as possible. We just think that a little more time given the pendency and the complication and history of this case would not unfairly prejudice UBS in the slightest, but to force us to a trial on June 4th would be prejudicial to my clients.

MR. CLUBOK: Your Honor, may I briefly respond to a couple new things I heard?

THE COURT: I think that I've heard what I need to hear today.

Let's just take a five-minute recess.

(Whereupon, at this time a short recess was taken.)

THE COURT: Let's go back on the record.

Back on the record.

Having read the parties' submissions and heard counsel for the parties on this conference call today, I am persuaded that the trial should be bifurcated and that that procedure will materially enhance the efficiency with which this matter is determined without causing prejudice to either party.

There are some complicated legal issues which need to be addressed on the breach-of-contract claim, including the computation of CDS losses as discussed in my summary judgment opinion and whether or not the contractual

provisions regarding CDS losses are ambiguous and, therefore, expert testimony or evidence of custom and usage should be taken in interpreting those provisions.

In addition, there are complicated issues, among others, with respect to the hedging offset claims. Those issues will require further briefing, and determination of those issues if there were a jury trial could result in considerable delays to the jury and to the parties.

So, that is the principal reason I am going to bifurcate; but, in addition, I do not find that the inconvenience to witnesses is a basis for not bifurcating.

Counsel have had adequate opportunity to determine whether any of these witnesses would not cooperate with a second phase of trial and nothing is being put before the Court to indicate that there is not going to be cooperation of these witnesses; or that if there is not cooperation as it turns out, that the testimony cannot otherwise be obtained from the witnesses via videotaped depositions or otherwise and -- or rather videotaped trial testimony or otherwise.

And, in addition, I do not find that the fact that the defendants have chosen to retain new trial counsel on the eve of trial is a basis for deferring any longer the trial of this matter.

I appreciate that it has been difficult for new

counsel to come in and prepare for this trial; but, if anything, new counsel's performance on this conference call today shows what an exceptional job counsel has done in a relatively short time in gaining mastery over the details of this complex case.

I am willing, however, to put the trial over for one month to early July to give counsel a further opportunity to prepare. I don't think that that delay would prejudice the plaintiff, and it would actually suit my schedule better than the June 4th trial date. Although, I could keep that date if it were absolutely necessary.

So, we have the defendants' list of trial conflicts. It does not appear that starting on July 2nd would cause a problem. There are some witnesses that are unavailable on certain days, but it doesn't look like the bench part of the trial will be so lengthy that we couldn't work around that.

Does the plaintiff have a problem with a July 2nd start date?

MR. CLUBOK: I think that should be fine, your Honor, with the caveat that with a little flexibility to carry into the next week as needed. Obviously, with the Fourth of July, we have to check, double check with people for that week. But, if July 2nd works for your Honor, then I think that would be fine.

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THE COURT: Is the Fourth of July midweek? It is, isn't it?

MR. CLUBOK: It is a Wednesday so it is possible, I suppose, that week could be tough for some people.

THE COURT: Maybe we should start the following week, the 9th. Does that work?

MR. CLUBOK: That's okay with us, I believe.

THE COURT: Ms. Klein, does that work for you?

MS. KLEIN: Mr. Cruciani, are you still on?

MR. CRUCIANI: I am, and it does.

MR. CLUBOK: I believe that should work for us, your Honor.

THE COURT: That's very good. And let me say, also, that another significant reason for bifurcating is so that I can very carefully consider the evidence in this case and the law that counsel will brief before I present any issues to the jury assuming without suggesting one way or the other or otherwise, of course, that there may be a judgment in favor of the plaintiff. And that probably is even more important than avoiding delays due to consideration of some of the complex issues that I outlined earlier.

So I think this really will work for the best, not only for the parties to receive a considered decision, but also from the point of view of avoiding jury delays.

Now, I would like counsel to have the opportunity to brief whatever issues they wish to brief, but I think that counsel should confer on what issues they are going to brief so that each side will have the opportunity to address those issues.

And, I would also like to have counsel address the issue of the proper interpretation of CDS losses, whether the contract is ambiguous and whether parol evidence will need to be taken on that issue.

I would like to leave the call at this point and have you discuss with Ms. Barnett how long you need for this briefing, what page limits you think you need and what you want to do with the previously scheduled May 8th pretrial conference. It may be best to defer that until after we receive the briefs; but if there are other issues that you think you are going to need to deal with in the near future, we can go ahead.

So, I'm going to leave the call at this time. I'm requesting that the plaintiff obtain a copy of the transcript of today's proceedings, e-file it and file two hard copies with the clerk of the part.

The transcript will not be so ordered until I receive the hard copies.

Let me remind you that I reserve the right to correct errors in the transcript. Therefore, if it is

needed for any further purpose, you should be sure you have a copy as so-ordered by me and not merely as signed by the court reporter.

Thank you.

CERTIFIED TO BE A TRUE
AND CORRECT TRANSCRIPT

_____
BONNIE PICCIRILLO
OFFICIAL COURT REPORTER

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